STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 22, 2012
v	No. 303099 Wayne Circuit Court
RASHOD LAMAR BROWN, Defendant-Appellant.	LC No. 10-010139-FC

Before: RONAYNE KRAUSE, P.J., and SAAD and BORRELLO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of second-degree murder, MCL 750.317, two counts of assault with intent to commit murder, MCL 750.83, one count of felon in possession of a firearm, MCL 750.224f, and one count of possession of a firearm during the commission of a felony ("felony-firearm"), MCL 750.227b. The trial court sentenced defendant, as a third habitual offender, MCL 769.11, to 55 to 82 ½ years for second-degree murder, 20 to 40 years for each count of assault with intent to commit murder, one to five years for felon in possession of a firearm, and five years for felony-firearm. We affirm.

This case arises from a shooting that took place in Detroit, Michigan. Around 5:30 p.m. on March 16, 2010, Darrell Young was working at a mechanic shop at the corner of Grand River Avenue and Martindale Road. Young was underneath a car when a group of approximately five men approached. The men were talking about the gold Chevy Malibu in front of the shop—Young's brother's car. Young testified that one of the group apparently believed that the car was his. Young began to emerge from underneath the car and one of the men hit him in the face. Young then retreated underneath the car. The men then walked away and down the block. Shortly thereafter, police officers arrived; they talked to Young and to the group who had just left the shop. Defendant flagged down the officers from across the street and told them that the Malibu in question was his car and that it had been stolen the previous month. The police investigated and determined that the car did not belong to defendant and he became very aggravated. The Young brothers were later driving on Littlefield and, ultimately, defendant shot many times at both of them while they were in the vehicle. The bullets went "everywhere." One of the Young brothers was injured and a neighbor in the area, David Adams, was killed.

Defendant first argues that the trial court improperly denied his request for a self-defense instruction based upon his failure to testify and because there was evidence to support a self-defense instruction. We disagree as to both bases for this argument.

Claims of instructional error are reviewed de novo. *People v Kowalski*, 489 Mich 488, 501; 803 NW2d 200 (2011). The instructions must be considered as a whole to determine whether any error occurred. *Id.* "A trial judge must instruct the jury as to the applicable law, and fully and fairly present the case to the jury in an understandable manner." *People v Waclawski*, 286 Mich App 634, 676; 780 NW2d 321 (2009). Jury instructions are crafted to permit the fact-finder to decide the case correctly and intelligently. *People v Burns*, 250 Mich App 436, 440; 647 NW2d 515 (2002). Thus, the instructions should include not only all the elements of the charged offense, but also material issues, defenses, and theories which are supported by the evidence. *Id.* The trial court must give a defendant's requested instruction when the instruction concerns his theory and is supported by the evidence. *People v Rodriguez*, 463 Mich 466, 472-473; 620 NW2d 13 (2000).

"'[T]he killing of another person in self-defense is justifiable homicide if the defendant honestly and reasonably believes that his life is in imminent danger or that there is a threat of serious bodily harm.'" *People v Kurr*, 253 Mich App 317, 320-321; 654 NW2d 651 (2002) (quotation omitted). To be necessary, self-defense normally requires that the actor try to avoid the use of deadly force if he can safely and reasonably do so, either by applying nondeadly force or by using an obvious and safe avenue of retreat. *People v Riddle*, 467 Mich 116, 119; 649 NW2d 30 (2002). However, a person is not required to retreat from a sudden, fierce and violent attack, nor is he required to retreat from an attacker who he reasonably believes is about to use a deadly weapon. *Id.* Instead, he may confront the attacker and respond with force. *Id.* Further, a defendant claiming self-defense has no duty to retreat from his home. *People v Taylor*, 195 Mich App 57, 63-64; 489 NW2d 99 (1992).

There was simply no evidence of self-defense presented. Defendant argues that the Young brothers appeared to drive their car at defendant. Some testimony could be taken out of context and viewed as supporting that contention. However, in context, the testimony included defendant lying in wait with a rifle, standing in the street. Defendant contends that there was testimony calling into question whether he or the Young brothers shot first. We disagree: our reading of the record makes it clear that defendant was the first person to shoot, and, even more saliently, even if the first shooter was in doubt, defendant was waiting with a gun for the Young brothers to return.

Defendant argues that the trial court did not give the self-defense instruction because it believed that defendant was required to testify to have that instruction given. Again, when taken out of context, some of the trial court's discussion could be so viewed. However, the trial court never suggested that a defendant must take the stand to be entitled to an instruction on self-defense; rather, the trial court correctly pointed out that the defense's theory of the case did not seem to be supported by the evidence, so a self-defense instruction would be inappropriate unless some other evidence—which in this case could only come from defendant—was introduced in support. The trial court then generously afforded the defense the weekend to decide whether defendant wished to testify. We therefore find defendant's assertion without merit.

Defendant argued self-defense in closing argument, stating that the Young brothers could have shot first. The jury was instructed that in order to find defendant guilty of first-degree murder, the jury must find that the "killing was not justified . . . [or] excused." Jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). It is thus more likely that the jury considered and dismissed defendant's theory of the case, finding him guilty of the lesser offense, second-degree murder.

Defendant next argues that an aiding and abetting instruction was improperly given to the jury when there was no evidence that defendant aided and abetted a second shooter. We disagree.

Because defendant failed to preserve this issue, we review this claim for plain error which affected defendant's substantial rights. *People v Martin*, 271 Mich App 280, 336-337; 721 NW2d 815 (2006). To show plain error, a criminal defendant must show that (1) an error occurred, (2) the error was plain, meaning it is clear or obvious; and (3) the plain error affected substantial rights, meaning it affected the outcome of the lower court proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Every person who procures, counsels, aids, or abets in the commission of a crime may be prosecuted, indicted, and tried, and, if convicted, punished as if he had directly committed the offense. MCL 767.39; *People v Plunkett*, 485 Mich 50, 61; 780 NW2d 280 (2010). The elements of aiding and abetting are: "'(1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement.'" *Id*. (quotation omitted).

"[T]he elements of second-degree murder are as follows: (1) a death, (2) the death was caused by an act of the defendant, (3) the defendant acted with malice, and (4) the defendant did not have a lawful justification or excuse for causing the death." *People v Smith*, 478 Mich 64, 70; 731 NW2d 411 (2007). "Malice is defined as the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998). When a defendant is held vicariously liable for a killing committed by another, he must be found to have had the same mens rea required to convict the principal. *People v Kelly*, 423 Mich 261, 278-280; 378 NW2d 365 (1985).

Defendant only takes issue with his second-degree murder conviction on an aiding and abetting theory, stating that there was no evidence that defendant aided and abetted a second shooter. However, a witness testified that another man also had a gun on the front lawn, and that man was also firing a gun with defendant. Derell Young testified that it sounded as though there were two or more shooters. The sheer quantity of shell casings found also supports the theory of a second shooter. There was thus evidence to support that defendant was shooting in concert with another individual. David Adams's bullet wound was a "through and through" bullet wound; therefore, if the jury were to find that there were two shooters, there is a possibility that the bullet that killed Adams could have been from the second shooter. Therefore, there was evidence to support that defendant aided and abetted another in killing Adams with malice, and

as such, no error, let alone plain error exists. Furthermore, there was ample evidence from which the jury could have found defendant guilty of second-degree murder irrespective of the presence of a second shooter, and indeed, two witnesses identified defendant as the only shooter. Therefore, the aiding and abetting instruction would not have affected the outcome of the lower court proceedings in any event.

Defendant next argues that his trial counsel was ineffective for failing to request a self-defense instruction. We disagree. Defense counsel did, in fact, request an instruction regarding self-defense. Defendant therefore fails to show error.

Defendant next argues that the evidence was insufficient to sustain a conviction of second-degree murder, and further, that the verdict was against the great weight of the evidence. We disagree.

We review a claim of insufficient evidence in a criminal trial de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). When reviewing a claim that the evidence presented by the prosecution was insufficient to support the defendant's conviction, we view the evidence in a light most favorable to the prosecution to determine if a rational trier of fact could find beyond a reasonable doubt that the prosecution established the essential elements of the crime. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992). Therefore, "a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the . . . verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). This Court reviews an unpreserved claim that the verdict was against the great weight of the evidence for whether there was plain error which affected the defendant's substantial rights. *People v Cameron*, 291 Mich App 599, 617; 806 NW2d 371 (2011).

The prosecution presented sufficient evidence for a jury to find defendant guilty of second-degree murder, and for the same reasons, the verdict was not against the great weight of the evidence.

All murder which is not first-degree murder is second-degree murder. *People v Garcia (After Remand)*, 203 Mich App 420, 424-425; 513 NW2d 425 (1994); MCL 750.317. The elements of second-degree murder are: "(1) a death, (2) the death was caused by an act of the defendant, (3) the defendant acted with malice, and (4) the defendant did not have a lawful justification or excuse for causing the death." *Smith*, 478 Mich at 70; MCL 750.317. "Malice may be inferred from evidence that the defendant intentionally set in motion a force likely to cause death or great bodily harm." *People v Roper*, 286 Mich App 77, 84; 777 NW2d 483 (2009) (internal quotation omitted). The defendant need not intend to cause harm or death, but must only intend an act in obvious disregard of the consequential danger to the lives of others. *Id*. If a defendant shoots at one person, but hits another, his intent may be transferred. *People v Lawton*, 196 Mich App 341, 350-351; 492 NW2d 810 (1992).

Defendant pointed what witnesses described as an assault rifle at a moving vehicle, and he fired a staggering number of shots at the vehicle. There is simply no room for doubt that defendant therefore intended to cause great bodily harm to the occupants of that vehicle. Adams was standing in front of his home a few houses down, and he suffered a fatal bullet wound. This

evidence supported the inference that Adams was hit by a bullet intended for the Young brothers. The prosecution thus sufficiently proved malice.

Second, the prosecution sufficiently proved causation. Proof of second-degree murder requires proof only that the defendant's conduct was the cause in fact of the victim's death. *People v Werner*, 254 Mich App 528, 541-542; 659 NW2d 688 (2002). Testimony supported that defendant shot first at the Young brothers. The prosecution presented evidence that the Malibu was shot at from behind and that there were at least seven bullet holes in the Malibu. The prosecution also presented evidence that the Young brothers did not shoot back. Therefore, if the jury found that defendant was the only shooter, the jury could also find that the bullet that killed Adams must have come from defendant's use of an assault rifle. In this way, the evidence supported a jury finding that defendant was the cause-in-fact of Adams's death.

Finally, the prosecution sufficiently showed that defendant did not act with justification or excuse. The prosecution presented evidence that upon seeing the Malibu on his street, he went into his home and emerged with the rifle. He pointed the assault rifle at the Malibu and rapidly fired at the occupants inside. The Young brothers did not shoot back, and instead, sped toward Young's son's mother's home. This evidence supported a jury finding that defendant was not acting in defense of himself or others. The prosecution thus presented sufficient evidence of second-degree murder. Furthermore, in the alternative, the prosecution presented sufficient evidence of second-degree murder via an aiding and abetting theory, as discussed *supra*.

For the same reasons, the verdict was not against the great weight of the evidence. In determining whether the verdict was against the great weight of the evidence, an appellate court considers "whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *Cameron*, 291 Mich App at 616-617. Although some witnesses stated that the Young brothers shot back at defendant, or that they could not tell who shot first, these issues pertain to witness credibility, and the testimony did not render the other witnesses' testimony patently incredible such that a new trial is warranted. *People v Lemmon*, 456 Mich 625, 643-644, 647; 576 NW2d 129 (1998).

Affirmed.

/s/ Amy Ronayne Krause
/s/ Henry William Saad
/s/ Stephen L. Borrello